

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE SESSION, 1995

<p><b>FILED</b></p> <p>January 12, 1996</p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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JULIUS FATE BRANAM, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 Appellee. )

No. 03C01-9502-CR-00034  
 Bradley County  
 Hon. Mayo L. Mashburn, Judge  
 (Post-Conviction)

For the Appellant:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joseph M. Tipton  
 Judge

## OPINION

This is an appeal as of right from a judgment of the trial court denying the appellant's application for post-conviction relief. The petitioner was convicted of first degree murder on October 18, 1979, and was sentenced to life imprisonment. His conviction was affirmed on appeal. State v. Branam, 604 S.W.2d 892 (Tenn. Crim. App. ), app. denied (Tenn. Sept. 2, 1980). On July 26, 1988, he filed a petition for post-conviction relief asserting that he received the ineffective assistance of counsel and that his conviction resulted from a violation of due process because the trial court's jury instruction regarding malice violated Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979). The trial court summarily dismissed the petition, but this court vacated the dismissal and remanded the case for the appointment of counsel and an evidentiary hearing on the Sandstrom issue. Julius Fate Branam v. State, No. 03-C-01-9204-CR-00066, Bradley Co. (Tenn. Crim. App. Aug. 12, 1993). On remand, the trial court appointed counsel to assist the petitioner. After counsel for the petitioner and state advised the court that no evidence other than the trial transcript was to be offered, the trial court dismissed the petition on the merits without an evidentiary hearing. The trial court ruled that the jury instructions given at the petitioner's trial did not violate Sandstrom and that even if the jury instructions contained a Sandstrom error, the guilt of the petitioner was so overwhelming that such error was harmless beyond a reasonable doubt.

The defendant contends that the trial court erred by ruling that no Sandstrom error occurred, but he fails to address the effect of the alleged error. The state concedes that the trial court may have erred in its finding of no Sandstrom error but argues that any Sandstrom error was harmless. After a thorough review of the record, we conclude that the malice instruction given at the defendant's trial is unconstitutional under Sandstrom. However, because of the overwhelming evidence

of the defendant's guilt, we hold that the error was harmless beyond a reasonable doubt.

In Sandstrom, the Supreme Court held that an instruction which effectively tells the jury that they are to presume the existence of malice, when such is an element of the offense, impermissibly shifts the burden of proof to the defendant. Although Sandstrom was decided before the petitioner's trial, Tennessee did not adopt Sandstrom until October of 1984, when our supreme court decided State v. Bolin, 678 S.W.2d 40, 45 (Tenn. 1984). Because the petitioner was convicted before Tennessee courts implemented the Sandstrom ruling, the alleged error is a cognizable ground for post-conviction relief. See, e.g., Swanson v. State, 749 S.W.2d 731, 736 (Tenn. 1988).

At the petitioner's trial, the trial court charged the jury that the state had the burden of proving beyond a reasonable doubt:

(2) that the killing was malicious; that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victim was killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption[.]

This was the only charge on malice contained in the first degree murder instruction, although the trial court gave a more complete explanation of malice in the second degree murder instruction. In State v. Martin, 702 S.W.2d 560 (Tenn. 1985), overruled on other grounds by State v. Brown, 836 S.W.2d 530, 542-43 (Tenn. 1992), the trial court gave this same malice charge to the jury in its instruction of first degree murder and gave full explanations of express and implied malice in its second degree murder instruction. Although the first degree murder instruction in Martin "was preceded by general instructions that the state must establish each of the elements of the offense beyond a reasonable doubt" and was followed by "general instructions concerning the

presumption of innocence and reasonable doubt," our supreme court held that the instructions were not constitutionally sufficient under Sandstrom. Like the instruction in Martin, the instruction on malice in the present case was inadequate, despite the fact that the trial court gave general instructions concerning the burden of proof.

Having concluded that the instructions given at the petitioner's trial violated Sandstrom, we must determine whether the error is harmless. Rose v. Clark, 478 U.S. 570, 580, 106 S. Ct. 3101, 3109 (1986); State v. Bolin, 678 S.W.2d 40,45 (Tenn. 1984). The proof at the petitioner's trial showed that the petitioner was less than five feet away from the victim when he shot him in the back with a 12-gauge shotgun. From a distance of greater than five feet, the petitioner fired another shot into the side of the victim's back. The petitioner testified that he shot the victim. Although he claimed the shooting was in self-defense, the petitioner admitted that the victim was trying to walk or run away from him at the time of the shooting.

Malice is "an intent to do harm or cause injury to another, but not necessarily to cause death." Welch v. State, 836 S.W.2d 586, 591 (Tenn. Crim. App.) (citation omitted), app. denied (Tenn. Mar. 6, 1992). The petitioner intentionally shot the victim with a 12-gauge shotgun. His intent to do harm is apparent, and the element of malice established beyond any reasonable doubt.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Jerry Scott, Presiding Judge

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Joseph S. Daniel, Special Judge